

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

GEORGE MONTERO and SHARON ROSE
MONTERO, husband and wife, and the marital
community thereof,

Plaintiffs,

v.

WASHINGTON STATE PATROL, a
Washington State Agency, KEITH JORDAN and
“JANE DOE” JORDAN, husband and wife, and
the marital community thereof,

Defendants.

CASE NO. C05-1092C

**FINDINGS OF FACT AND
CONCLUSIONS OF LAW**

Plaintiffs George Montero and Sharon Montero brought this action pursuant to 42 U.S.C. § 1983, alleging that the stop of George Montero by former Washington State Trooper Keith Jordan was without probable cause and violated his constitutional rights. After bench trial and pursuant to Federal Rule of Civil Procedure 52(a), the Court makes the following findings of fact and conclusions of law:

PROCEDURAL HISTORY

In June of 2005, Plaintiffs brought this action against the Washington State Patrol (“WSP”), Keith Jordan (“Jordan”) and his wife “Jane Doe” Jordan, alleging false arrest, false imprisonment, negligent supervision and hiring against WSP alone, negligent infliction of emotional distress, and violation of 42

1 U.S.C. § 1983. (Dkt. No. 1.) Jordan brought a cross-claim against WSP, alleging that he was entitled to
2 a defense provided by the Attorney General of the State of Washington pursuant to Washington Revised
3 Code § 4.92.060. (Dkt. No. 8.)

4 Defendants filed separate motions to dismiss. They each argued that Montero's claims against
5 WSP and Jordan in his official capacity were barred by the doctrine of sovereign immunity, and that some
6 of his claims were barred by the statute of limitations. (Dkt. Nos. 11, 12.) The Court agreed that WSP
7 and Jordan in his official capacity were protected by sovereign immunity, and accordingly dismissed all
8 claims against WSP. (Dkt. No. 17.) In addition, the Court found that Montero's claims against Jordan
9 for false arrest and false imprisonment were barred by Washington's two-year statute of limitations.
10 Wash. Rev. Code § 4.16.100(1). The Court applied Washington's catch-all three-year statute of
11 limitations to Montero's § 1983 claim and his claim for negligent infliction of emotional distress. Wash.
12 Rev. Code § 4.16.080(2). Finding that this statute of limitations did not begin to run until Montero
13 received a letter from the Snohomish County Prosecutor's Office overturning his conviction, the Court
14 found that his § 1983 claim and his claim for negligent infliction of emotional distress were not barred by
15 the statute of limitations. (Dkt. No. 17.) Thus, the Court proceeded to trial on Montero's § 1983 claim
16 and his claim for negligent infliction of emotional distress as against Jordan in his individual capacity.¹

17 **FACTS**

18 **I. Montero's Arrest**

19 On the evening of June 8, 2002, Trooper Keith Jordan was conducting traffic law enforcement
20 duties for the Washington State Patrol in District 7 of Snohomish County. At around 9:50 p.m., Jordan
21 was traveling southbound on Highway 99 in his marked patrol car when he spotted Montero's blue Ford
22

23 ¹ As noted above, Jordan brought a cross-claim against the Washington State Patrol, alleging that
24 he was entitled to a defense provided by the Attorney General of the State of Washington pursuant to
25 Washington Revised Code § 4.92.060. Because the Attorney General's Office provided Jordan's
26 representation, this cross-claim appears to be moot. In any event, Jordan did not pursue the claim at trial,
and thus, it is waived.

1 pickup truck, also traveling southbound on Highway 99.

2 Montero was on his way home from a sports bar called Jimmy Mack's at the time. Montero had
3 spent two hours at Jimmy Mack's. During that time, he drank three vodka tonics before having a cup of
4 coffee and heading home. Nonetheless, he testified that he was not intoxicated during the drive home,
5 and that he was driving well.

6 Jordan testified, and memorialized in his arrest report, that Montero was weaving in the
7 right-hand lane, and crossed the fog line by more than a tire width on three occasions. As a result, Jordan
8 activated his emergency lights, causing Montero to turn into a nearby Burger King parking lot and stop.

9 Montero testified that on the evening that he was pulled over, Highway 99 was undergoing
10 extensive construction, and that there were barrels, cones, and delineators lining the highway along his
11 route. He testified that he did not hit any construction markers, which he surely would have hit if he had
12 been weaving as badly as Jordan indicated in his report. Jordan's arrest report did not indicate the
13 presence of construction markers. Jordan recalled that construction was heavy on Highway 99 that
14 summer and that the barrels moved around frequently. He testified that he likely would have included
15 that detail in his report if there had been construction markers near where he observed Montero weaving.

16 Once Montero was stopped, Jordan approached the driver's side of the vehicle and noticed an
17 odor of intoxicants coming from inside Montero's truck, and that Montero's eyes were red and watery.
18 Montero acknowledged that he had been drinking at Jimmy Mack's. With Montero's consent, Jordan
19 then administered a series of road-side driving tests intended to assess the level of Montero's intoxication,
20 including the horizontal gaze nystagmus test, the walk and turn test, and the one-leg stand. These field
21 sobriety tests showed indications of intoxication. Jordan then administered a portable breath test, which
22 indicated that Montero's blood alcohol content was 0.12, over the legal limit of 0.08. At that point,
23 Jordan arrested Montero for driving under the influence.

24 Jordan tested Montero's blood alcohol content on the BAC machine at around 10:30 p.m. and
25 again shortly before 11:00 p.m. Montero's blood alcohol content tested at 0.078 and 0.071, just below

1 the legal limit. Montero indicated that he felt the arrest was in error at the time that it occurred.

2 Nonetheless, he was found guilty of driving under the influence by a unanimous jury.

3 **II. Jordan's Resignation**

4 Early in 2003, an attorney for the Snohomish County Public Defender's Office, Robert O'Neil,
5 became suspicious of some of Jordan's police reports. According to O'Neil, Jordan had a reputation for
6 long, thorough, and proficient arrest reports. Jordan's arrest reports were typically divided into
7 subsections organized under standard headings, such as "Initial Observation," "Vehicle In Motion," etc.
8 One such heading that he commonly included in his reports was "Booking." O'Neil's suspicions were
9 aroused when he noticed that in one of Jordan's reports, chronicling the arrest of one Corey James
10 Watson, the "Booking" heading instead read "Boowatson." O'Neil later found that the "Booking"
11 heading in the arrest report for Jamen Lee Anderson read "Booanderson." The arrest report for Mr.
12 Watson was dated January 4, 2003, and the arrest report for Mr. Anderson was dated January 9, 2003.
13 On January 5, 2003, Jordan had drafted an arrest report for Brandon Christopher King. This led O'Neil
14 to believe that Jordan had used the King arrest report as a template for the Watson and Anderson reports,
15 despite the fact that the Watson report is dated the day before the King report. O'Neil filed a public
16 records request and obtained more of Jordan's arrest reports. He did not, however, review Montero's
17 arrest report.

18 In April of 2003, O'Neil addressed a memo to several individuals in the Snohomish County
19 Prosecutor's Office, detailing his suspicions about Jordan's reports, and indicating that he intended to
20 seek dismissal in the cases in which he was representing a party who had been arrested by Jordan for
21 driving under the influence. O'Neil had concluded that Jordan inappropriately used boiler plate factual
22 allegations in his arrest reports, backdated his reports, and omitted material facts bearing on his
23 procedure and the admissibility of evidence.

24 Ed Stemler, one of the individuals in the Snohomish County Prosecutor's Office who received
25 O'Neil's memo, testified that upon receipt of the memo, he pulled and reviewed approximately 150 of

1 Jordan's arrest reports. After this investigation, the Snohomish County Prosecutor's Office took a
2 couple of actions. First, in May of 2003, it notified the defense counsel in all cases in which Jordan was
3 the reporting officer, including Montero's defense counsel, of "irregularities in how a particular police
4 officer prepared his reports." The reported irregularities included the use of templates that led to similar
5 or identical factual assertions, errors resulting from careless use of the find-and-replace command, and
6 improper dating of reports. The letter did not indicate that Jordan had intentionally fabricated his reports.
7 Second, the Snohomish County Prosecutor's Office dismissed the charges in many of Jordan's pending or
8 recently concluded cases.

9 The Snohomish County Prosecutor's Office was in touch with WSP about O'Neil's allegations
10 soon after it received his memo. Robert Lenz, who was a WSP captain at the time of these events,
11 testified that WSP decided to instigate an internal investigation into Jordan's conduct. However, on May
12 16, 2003, at an early meeting on the issue, Jordan abruptly decided to resign. As a consequence, the
13 matter was not further investigated by WSP.

14 Jordan testified that his resignation had been the result of an accumulation of frustrations with
15 WSP, not merely the incipient investigation into his report-writing. He later had second thoughts about
16 his hasty resignation, and tried unsuccessfully to get his job back. He also indicated at trial that, in
17 retrospect, he wishes an investigation had been conducted so that questions as to whether he had
18 intentionally falsified his reports could have been put to rest.

19 The Court finds that Jordan credibly answered the doubts raised by Montero as to the veracity of
20 his arrest reports. He provided an explanation as to his report-writing process that was consistent with
21 the arrest reports submitted and the errors described in the O'Neil memo. He indicated that his report-
22 writing style was developed based on input from a number of different individuals, including attorneys, as
23 to what would make his arrest reports better. He conceded that he had used a series of templates for his
24 reports, and indicated that the template he was using when Montero was arrested was quite basic. He
25 also indicated that only the elements that did not change from case-to-case were included in his templates.

1 He indicated that the find-and-replace errors were “bone-headed mistakes” and described himself as
2 “computer illiterate.” Most importantly, he testified that he never wrote anything in a report that he did
3 not believe to be accurate.

4 The Court finds as a factual matter that any errors in Jordan’s reports were due to negligence, not
5 intentional falsification. Careless use of the find-and-replace command in his word-processing program
6 could explain the erroneous “Boowatson” and “Booanderson” headings. Though Montero persuasively
7 showed that Jordan backdated one of his reports by one day, the Court cannot discern what motivation
8 Jordan would have had to intentionally backdate the report by one day, and thus, this cannot form the
9 basis for a finding of intentional falsification. Moreover, while the use of a template in drafting an arrest
10 report may be ill-advised, the Court finds it easy to understand the appeal of such a system. Officers
11 receive extensive training on the indications for drunkenness, and good officers surely develop patterns in
12 looking for those indications while investigating a driver they suspect to be intoxicated. DUI arrests are
13 largely routine. It is to be expected that the reports memorializing these arrests would be routine as well
14 and that they would include some substantive similarities. The arrest reports reviewed by the Court
15 contained similarities in organization and in elements that were unchanging from arrest to arrest. The
16 elements that necessarily did change from arrest to arrest—such as the location of the arrest and behavior
17 of the driver that led Jordan to pull the vehicle over—changed from report to report. Thus, the Court
18 credits Jordan’s testimony that any errors in his reports were due to carelessness, “bone-headedness,” and
19 computer-illiterance. While these errors should not, and were not, taken lightly, Montero has not made a
20 showing that they were the result of intentional falsification.

CONCLUSIONS OF LAW

I. Section 1983 Claim²

In order to show that Jordan violated 42 U.S.C. § 1983, Montero must prove by a preponderance of the evidence that “(1) that the conduct complained of was committed by a person acting under color of state law; and (2) that the conduct deprived a person of rights, privileges, or immunities secured by the Constitution or laws of the United States.” *Johnson v. Hawe*, 388 F.3d 676, 681 (9th Cir. 2004) (internal citations omitted). The parties do not dispute that Jordan acted under color of law. He pulled Montero over while engaged in his official duties, in uniform, and driving his marked patrol car.

Jordan does dispute that he deprived Montero of a constitutionally protected right, however. Montero alleges that he was driving well when pulled over, and that he gave no indications of being drunk during the road-side sobriety tests. This boils down to an allegation that he was arrested without probable cause. It is axiomatic that the Fourth Amendment protects a person’s right to be arrested only on probable cause. *Beck v. Ohio*, 379 U.S. 89, 91 (1964) (“Whether that arrest was constitutionally valid depends . . . upon whether, at the moment the arrest was made, the officers had probable cause to make it.”).

The lawfulness of a state arrest by state police is to be determined by state law so long as the state law is not inconsistent with the Constitution. *Ponce v. Craven*, 409 F.2d 621, 625 (9th Cir. 1969); *Bergstralh v. Lowe*, 504 F.2d 1276, 1277 (9th Cir. 1974). Washington has adopted the position set forth in the Second Restatement of Torts § 667 that “the conviction of the accused by a magistrate or trial court, although reversed by an appellate tribunal, conclusively establishes the existence of probable cause, unless the conviction was obtained by fraud, perjury or other corrupt means.” *Hanson v. City of*

² Though Jordan did not so allege prior to trial, he argues now that he is entitled to qualified immunity. Because qualified immunity is most saliently “an entitlement not to stand trial or face the other burdens of litigation,” *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985), and because the Court, having completed the trial, is inclined to reach the merits, it is unnecessary to discuss the question of qualified immunity.

1 *Snohomish*, 852 P.2d 295, 298-99 (Wash. 1993) (“We now expressly hold that a conviction, although
2 later reversed, is conclusive evidence of probable cause, unless that conviction was obtained by fraud,
3 perjury or other corrupt means, or, of course, unless the ground for reversal was absence of probable
4 cause.”). While the rule set out in § 667 is applied primarily in the context of tort actions for malicious
5 prosecution, nothing in *Hanson* indicates that it should be limited to those tort actions. In *Hanson*, the
6 Washington Supreme Court held that the conviction of the plaintiff established probable cause as a matter
7 of law not only for his claim of malicious prosecution, but also for his claims of false arrest and false
8 imprisonment and his civil rights claim. *Id.* at 301; *see also Bergstrahl v. Lowe*, 504 F.2d 1276 (9th Cir.
9 1974) (applying the § 667 rule that conviction establishes probable cause in the context of a § 1983
10 action that alleged an arrest was without probable cause); *Doggett v. Perez*, 348 F. Supp. 2d 1198 (E.D.
11 Wash. 2004) (applying the *Hanson* rule in the context of a § 1983 action alleging absence of probable
12 cause). *But cf. Fondren v. Klickitat County*, 905 P.2d 928, 934 (Wash. Ct. App. 1995) (declining to
13 dismiss plaintiff’s § 1983 claim despite the application of the *Hanson* rule because the § 1983 claim
14 alleged constitutional violations other than the absence of probable cause). Because Montero’s § 1983
15 claim hinges on a finding that he was arrested without probable cause, the Court finds that *Hanson* is
16 applicable.

17 It is uncontested that Montero was tried and convicted by a jury. Under *Hanson*, his conviction
18 conclusively establishes probable cause for his arrest even though it was later vacated, unless Montero
19 can show that the conviction was obtained through fraud, perjury, or other corrupt practice. Indeed,
20 Montero alleged that Jordan violated his constitutional rights by “making an arrest which was wrongful;
21 wrongfully transporting Plaintiff from his automobile to jail and detaining Plaintiff; falsely testifying
22 against him at trial; and falsifying his arrest record.” (Dkt. No. 1 at 4.) However, Montero did not bear
23 his burden of proof at trial that Montero’s conviction was obtained because Jordan falsified his police
24 report and perjured himself at Montero’s trial. As is discussed above, Montero’s argument that Jordan
25 regularly falsified his police reports, as supported by O’Neil’s assertions and Jordan’s resignation from

1 WSP, was not sufficient to persuade the Court that the irregularities and errors in Jordan's reports were
2 due to anything more insidious than carelessness and unfamiliarity with word processing programs.
3 Montero could not point to anything in his own arrest report that indicated irregularity. Since the Court
4 found Jordan's testimony as to his report-writing practices persuasive, Montero has failed to make the
5 necessary showing that Jordan committed a wrong of constitutional proportions by knowingly and
6 intentionally pulling over and arresting Montero without probable cause, falsifying the report describing
7 Montero's arrest, and then perjuring himself at Montero's trial.

8 **II. Negligent Infliction of Emotional Distress**

9 The tort of negligent infliction of emotional distress has five elements under Washington law: first,
10 the plaintiff must prove the traditional elements of negligence—duty, breach, proximate cause, and
11 damage or injury. *Snyder v. Med. Serv. Corp.*, 35 P.3d 1158, 1164 (Wash. 2001). In addition, the
12 alleged injury must meet an "objective symptomatology" requirement, *Hunsley v. Giard*, 553 P.2d 1096,
13 1103 (Wash. 1976), by being both "susceptible to medical diagnosis and proved through medical
14 evidence." *Hegel v. McMahon*, 960 P.2d 424, 431 (Wash. 1998).

15 Montero's claim of negligent infliction of emotional distress fails on two counts. First, he is
16 unable to show that Jordan owed him a duty. In *Keates v. City of Vancouver*, 869 P.2d 88 (Wash. Ct.
17 App. 1994), the Washington Court of Appeals reviewed a trial court's grant of summary judgment on a
18 plaintiff's negligent infliction of emotional distress claim against a police officer who aggressively
19 questioned him while investigating the plaintiff's involvement in his wife's murder. The court noted that
20 as a general rule, law enforcement activities are not reachable in negligence and that plaintiffs seeking
21 redress for emotional distress caused by being accused of a crime usually must prove the elements of
22 malicious persecution. *Id.* at 94. Accordingly, the court held that "police officers owe no duty to use
23 reasonable care to avoid inadvertent infliction of emotional distress on the subjects of criminal
24 investigations." *Id.* As noted above, Montero has failed to show that any errors in Jordan's police
25 reports were the result of intentional falsification. Under *Keates*, Jordan has no duty to avoid the

1 inadvertent infliction of emotional distress that resulted from this negligence.

2 Second, Montero failed to introduce medical evidence in order to show that his emotional distress
3 met the objective symptomatology requirement. *See Haubry v. Snow*, 31 P.3d 1186, 1193 (Wash. Ct.
4 App. 2001) (holding that a trial court did not err in dismissing a negligent infliction of emotional distress
5 claim unsupported by medical evidence). Montero presented only his own testimony as to the emotional
6 distress he experienced as a result of his arrest, trial, and conviction. Even if medical evidence was not
7 required, Montero did not testify as to “neuroses, psychoses, chronic depression, phobia, shock,
8 posttraumatic stress disorder, or any other [such] disabling medical condition.” *Hegel*, 960 P.2d at 431
9 n.5. This is plainly insufficient under Washington law.

10 **III. Claims as to Plaintiff Sharon Montero**

11 The Court concludes that George Montero has no basis for recovery. Plaintiffs have not argued
12 that Sharon Montero, his wife, has an independent basis for recovery, and indeed, offered no evidence as
13 to any injuries she may have suffered during this incident. Thus, the claims advanced by Sharon Monter
14 fail as well.

15 **CONCLUSION**

16 Montero has failed to show by the preponderance of the evidence that his conviction was obtained
17 by perjury, fraud, or other corrupt means. While Jordan clearly made errors in some of his arrest reports,
18 Montero did not show that these errors resulted from conduct more insidious than negligence, or even
19 that any such errors were made in Montero’s arrest report. Accordingly, his § 1983 claim fails. In
20 addition, he cannot show that Jordan owed him a duty of reasonable care as a matter of law, nor did he
21 demonstrate the objective manifestations of his emotional distress using medical evidence. Thus, his
22 claim for negligent infliction of emotional distress must also fail.

1 Accordingly, and for the foregoing reasons, it is hereby ORDERED:

2
3 (1) Plaintiffs' claims are dismissed with prejudice and judgment is granted in favor of
4 Defendants; and

5 (2) The Clerk of the Court is directed to enter judgment in favor of the Defendants.
6
7
8

9 SO ORDERED this 29th day of January, 2007.
10
11

12 
13 John C. Coughenour
14 United States District Judge
15
16
17
18
19
20
21
22
23
24
25